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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
Case No. 82-6474

FRANK SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO THE PETITIONER'S PETITION
FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF FLORIDA IN THE UNITED STATES
SUPREME COURT

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PRELIMINARY STATEMENT

References to the State's appendix shall be by the symbol "R" followed by the appropriate page number. The State's appendix corresponds to the consecutive pagination of the record itself.

OPINION BELOW

Petitioner seeks review of his opinion sub nomine Smith v. State, 424 So.2d 726 (Fla. 1982).

JURISDICTION

Petitioner improvidently seeks to invoke this Court's jurisdiction pursuant to Title 28, U.S.C., Section 1247(3). The issues raised by Petitioner should not be reviewed by this Court. Review by writ of certiorari is a matter of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

STATEMENT OF THE CASE

The State accepts Petitioner's Statement of the Case for this petition only and with the proviso that additional facts (where necessary) will be found in the body of this Response.

QUESTION PRESENTED (RESTATE)

WHETHER PETITIONER'S VERDICT FOR FIRST DEGREE MURDER UNDER EITHER THE FELONY MURDER THEORY OR A PREMEDITATED MURDER THEORY IS CONSTITUTIONALLY SUFFICIENT TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY.

Petitioner, improvidently relying upon Enmund v. Florida, ____ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 1140 (1982), argues that there is no evidence to show that he was convicted for premeditated murder, that the jury probably convicted him of felony murder because it did not believe that he was the "trigger man" and that as such, imposition of the death penalty is unconstitutional.

In Enmund v. Florida, this Court held:

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

So ordered.

Id. at 1154. (Emphasis added).

This Court made it clear that there was no evidence to show that Enmund (the driver of the getaway car in the robbery) had any intention of taking human life. Id. at 1145, footnote 2 and 1152. Such was not the case here.

Taking the facts in the light most favorable to the State, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), Victor Hall testified that after abducting the victim, he, Copeland, and Smith went to Copeland's house to change cars. At Copeland's house, as they were in the process of changing cars, Smith specifically stated that he wanted to kill Sheila Porter because he didn't want to go to jail and he "didn't want her to testify". (R-2364). Later at the motel, after Sheila Porter had been repeatedly raped by all three defendants, Smith and Copeland had a conversation in which both agreed to kill Sheila Porter to keep her from testifying against them and going to prison for their crimes. (R-2374). When Hall, Copeland, the victim and Smith arrived at the Tram Road area it was Smith that pulled the victim out of the car and led her into the woods by the arm. (R-2376-2377). After Smith, Copeland, and the victim disappeared into the woods, Victor Hall heard three shots and then observed Smith and Copeland coming back out of the woods to the car. (R-2376-2378). It was Smith, not Copeland, that had the gun in his hand. (R-2378).

Clearly, this constituted evidence that Smith was the trigger man. But even if Smith wasn't the trigger man, Petitioner was a principle in the victim's murder, was present at the time she was murdered, and fully intended to kill her. (R-2374-2378).

Petitioner's callous intentions were evident after the murder as well. Smith returned to his grandmother's house, got into his car, and went to the Red Bird Cafe in Frenchtown, where he bought a sausage sandwich and then returned to motel room number one in the El Camino Motel, where he spent the rest of the night in the same bed and the same room where Sheila Porter had been raped. (R-2269).

Even assuming that the jury didn't believe that

Petitioner was the trigger man (R-2711-2713), the jurors must have concluded that Petitioner participated in and intended to kill the victim or they would have rejected Petitioner's defense of "withdrawal" because of the following jury instruction:

It is a defense to the offense of attempt to commit murder in the first degree that, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant abandoned his attempt to commit murder in the first degree or otherwise prevented the commission of the murder in the first degree.
(R-2682).

* * *

However, for one person to be guilty of a crime physically committed by another, it is necessary that he have a conscious intent that the criminal act shall be done, and that pursuant to that intent he do some act or say some word which was intended to and which did incite, cause, encourage, assist, or induce another person to actually commit the crime.

Mere presence at the scene of the crime, without more, is not sufficient to establish either an intent to participate or an act of participation.
(R-2689).

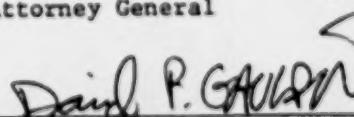
Under either theory, felony murder or premeditated murder, Petitioner's intent to murder the victim was clear. The imposition of the death penalty was proper under Enmund v. Florida.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should decline to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that I have placed in the United States Mail, postage prepaid, one (1) copy of the Response to the Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida in the United States Supreme Court, and the Appendix thereto, to counsel for the Petitioner Frank Smith:

Philip J. Pavodano
Post Office Box 873
Tallahassee, Florida 32302

on April 27th, 1983.

David P. Gauldin
David P. Gauldin

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APPENDIX

1 A Yes, sir, he did.

2 Q And what did he say?

3 A He stated he went back to the car.

4 Q And did Mr. Copeland also return to the car?

5 A Mr. Copeland returned to the car.

6 Q Where, if anywhere, did they go after returning to
7 the car?

8 A They took Victor Hall and dropped him off at a
9 store in Tallahassee that he said was called Cope's. And
10 then he further stated that Johnny Copeland took him to his
11 grandmother's house around three o'clock a.m., where he got
12 his car, and at this point, he stated he left and went over
13 to Frenchtown to the Red Bird Cafe, where he bought a sausage
14 sandwich.

15 Q And after eating the sausage sandwich, did he
16 indicate where he went?

17 A Yes, sir. He said he went back to the motel and
18 tried to sleep.

19 Q What room of the motel?

20 A Room number one.

21 Q Was it the same room that Sheila Porter was raped
22 in?

23 A That's correct.

24 Q Did he indicate where he spent the rest of the
25 night?

1 A Well, all three of us; me, Smith and Copeland.

2 Q Okay. And what was said and by whom?

3 A Smith was saying that he was going to kill her; he
4 didn't care who it was; he was going to, you know, kill her
5 because he didn't want to go to jail; he didn't want her to
6 testify to go to jail.

7 Q What was Copeland's attitude toward killing her?

8 A He agreed with it.

9 Q How about you?

10 A I didn't agree. I told them I didn't want --
11 didn't want her dead. I told them, you know, just let the
12 girl go, you know. Both of them agreed to kill the girl.

13 Q How long were you there at Copeland's house?

14 A We stayed there maybe 15, 20 minutes at the most.

15 Q Where did you go from there?

16 A Then we left there. Me and Smith and the girl left
17 in the Chrysler, and Copeland got in his car and followed us.

18 Q Okay. Let's stop there. Who was in Smith's car?

19 A Me, Smith and the girl.

20 Q Sheila Porter was in Frank Smith's car.

21 A Right.

22 Q Who was driving that car?

23 A Smith.

24 Q Where was Johnny Copeland?

25 A He was driving his yellow Nova, following behind us.

1 discussion of killing the girl before you went to the motel
2 and after you went to the motel. When --

3 A Right.

4 Q Tell us about the discussion about killing the girl
5 that occurred after getting to the motel.

6 A After we went? Well, after all -- you know, all
7 the raping went on, then Smith and Coneland were talking,
8 you know. They had kind of a little running conversation.

9 Q Where were they talking?

10 A In the back, back there, almost to the corner of
11 the bathroom.

12 Q What were they saying?

13 A They said they were going to take her and kill her;
14 take the girl off and kill her.

15 Q Why did they want to kill her?

16 A Because they figured she was going to testify
17 against them and they'd go to jail or prison or something
18 like that.

19 Q Did Mr. Copeland want to kill her?

20 A Yes.

21 Q Did Mr. Smith want to kill her?

22 A Yes.

23 Q How about you; did you want to kill her?

24 A No, I didn't.

25 Q Did you tell them that?

1 A I told them. I told them that I didn't -- you
2 know, I didn't agree with that. And I told them that I
3 think we should just let her go; let the girl go.

4 Q After that discussion in the motel, what happened?
5 Where did y'all go?

6 A Then we left --

7 Q Well, let me -- strike that for a second. Let me
8 go back and ask you this question first: How long were you
9 in the motel room?

10 A Well, I can't, you know, exactly how long it was,
11 but it was a pretty good while, I'd say. It could have been
12 maybe two, maybe one, maybe an hour or an hour and a half or
13 two hours, something like that, I would say, in the room;
14 something like that.

15 Q Where did you go after leaving -- after leaving the
16 motel?

17 A Then we left there, and we went to Tram Road.

18 Q How did you get to Tram Road?

19 A Copeland drove a yellow Nova there.

20 Q Who was in the car?

21 A Copeland, me and Smith, and the girl.

22 Q What kind of area is Tram Road where you went?

23 A It's a wooded area, you know, going out that way;
24 a bunch of woods, you know, all around, all -- going all
25 down the road and stuff like that, you know; woods and all

1 back there. A few houses in between, you know.

2 Q Where in that area did you go to?

3 A Well, we got to the end of Tram Road and -- well,
4 not exactly to the end. We got to the end of the pavement,
5 went straight out on the dirt road of Tram Road, went down
6 about, maybe, one or two bridges and turned off, going to a
7 real heavy wooded area.

8 Q Okay. Did you stop anywhere back in that wooded
9 area?

10 A Yes, we did.

11 Q When you stopped, what happened?

12 A Well, when we stopped, Copeland got out of the car
13 on the driver's side and went around the car. And then
14 Smith got out and opened the back door and pulled the girl
15 out. He told her to get out, and she hesitated, and he
16 pulled the girl out of the car.

17 Q Okay. Now, just -- I want to be as clear as I can.
18 Who pulled the girl out of the car?

19 A Smith.

20 Q After he pulled the girl out of the car, what
21 happened?

22 A Well, then Copeland led the way through the woods
23 and Smith and the girl went behind.

24 Q Smith and the girl followed Copeland into the
25 woods.

1 A Yes.

2 Q Was anyone touching the girl as they walked into
3 the woods?

4 A Yes. He had her by the arm.

5 Q Who had her by the arm?

6 A Smith.

7 Q They walked into the woods. Could you see them
8 after they got in the woods?

9 A I saw them to, you know, a certain distance, you
10 know --

11 Q Okay.

12 A -- and then I couldn't see them no more.

13 Q So they went -- they walked out of your sight.

14 A Right.

15 Q Okay. Did you hear anything once they walked into
16 the woods?

17 A Yes. About 15 or 20 minutes after -- after they
18 went out there.

19 Q What did you hear?

20 A I heard three shots.

21 Q Were they -- was there -- were they fired right
22 together or was there some space between the shots?

23 A I'd say maybe about two seconds space between the
24 shots.

25 Q How long was it before Mr. Smith and Mr. Copeland

1 returned to the car?

2 A Well, as soon as the shots, you know, I had heard
3 the shots, they came back. Both of them was coming back from
4 the woods together.

5 Q Both of them came back together?

6 A As I said, when they went out there, you know, it
7 was a while.

8 Q And then you heard the shots and they both came back
9 together.

10 A I heard the shots and they came back together.

11 Q Did they come back to the car?

12 A Yes, they did.

13 Q Did you see the gun after they had gotten back to
14 the car?

15 A Yes, I did.

16 Q Who had the gun when they got back to the car?

17 A Smith had the gun.

18 Q Where did he have it?

19 A He had it in his hand.

20 Q What did he do with it?

21 A And I think he got the bullets out or the shells,
22 you know, what he had shot and put the gun up somewhere, you
23 know. Like I was in the back seat on the left-hand side, and
24 I couldn't tell exactly whether he got rid of it or put it up
25 somewhere, in his coat pocket or what. But I did see the gun.

1 formed an intent to commit the crime of murder in the
2 first degree; secondly, the defendant did or performed
3 an act toward the commission of the murder -- of murder
4 in the first degree other than mere preparation to
5 commit the offense; and thirdly, the defendant failed
6 in the perpetration or commission of said offense or
7 was intercepted or prevented in the execution of the
8 murder in the first degree.

9 It is a defense to the offense of attempt to commit
10 murder in the first degree that, under circumstances
11 manifesting a complete and voluntary renunciation of
12 his criminal purpose, the defendant abandoned his
13 attempt to commit murder in the first degree or
14 otherwise prevented the commission of the murder in the
15 first degree.

16 This charge includes the lesser charges of attempt
17 to commit murder in the second degree and attempt to
18 commit murder in the third degree.

19 The lesser included charges just stated of attempt
20 to commit murder in the second degree or murder in the
21 third degree requires the same essential elements to be
22 proved beyond a reasonable doubt as just explained to
23 you in the charge of attempt to commit murder in the
24 first degree; that is, an intent to commit the crime,
25 the performance of an act toward the commission of the

1 personal act or through the act or acts of another
2 person. Any person who knowingly aids, abets, counsels,
3 hires or otherwise procures the commission of a crime
4 is equally guilty with the one who actually performs
5 the criminal act, whether he is or is not present at
6 the commission of the offense.

7 However, for one person to be guilty of a crime
8 physically committed by another, it is necessary that
9 he have a conscious intent that the criminal act shall
10 be done, and that pursuant to that intent he do some
11 act or say some word which was intended to and which
12 did incite, cause, encourage, assist, or induce another
13 person to actually commit the crime.

14 Mere presence at the scene of the crime, without
15 more, is not sufficient to establish either an intent
16 to participate or an act of participation.

17 It is not necessary that the State prove that the
18 crime was committed on the exact date alleged in the
19 indictment. A conviction of murder in the first degree
20 may be had upon proof that the crime was committed at
21 any time prior to the filing of the indictment.

22 A conviction of murder in the second degree or
23 armed robbery may be had upon proof that this crime was
24 committed without four years prior to the filing of the
25 indictment. But if the evidence does not justify a

1 MR. McGEE: I would suggest that whenever they want
2 to go, Judge.

3 THE COURT: Whenever they decide they want to go.

4 THE BAILIFF: One of you listen in, now.

5 Gentlemen of the jury and ladies, the judge informs
6 me that you can take all the time that you wish to
7 make -- to bring back your verdicts. And if you would
8 like to get lunch -- if you -- you can get lunch anytime
9 you like. Now, it's 5:30.

10 THE COURT: What -- what I'm saying, ladies and
11 gentlemen, is: I don't want you to dilly-dally, of
12 course, and I'm sure you don't want to. But I want you
13 to know that you -- you take your time in deliberation,
14 and if it comes time for dinner and you all want to go
15 to dinner or supper, why, I'll cause the bailiff to
16 take you at that time.

17 MR. PADOVANO: Thank you, Judge.

18 THE COURT: Court be at ease.

19 - - - - -

20 THE COURT: All right. Bring out the jury,
21 Mr. Richards.

22 (WHEREUPON, THE JURY RETURNED TO THE JURY BOX.)

23 JUROR: Your Honor, we have a question as to the
24 first charge here as the way it is worded.

25 THE COURT: All right, sir.

1 JUROR: The defendant, Frank Smith, in Count 1 of
2 the indictment is charged with the crime of murder in
3 the first degree in that on the 12th or 13th day of
4 December, in the year of our Lord 1978, did unlawfully
5 and from a premeditated design to effect the death of
6 one Sheila Porter, kill and murder the said Sheila
7 Porter by shooting her with a pistol.

8 Our question is that it doesn't state here was he
9 involved or did he actually do this or was a part of it
10 or --

11 THE COURT: No, sir. I think that is included in
12 the charge. And if -- if you would -- the instructions,
13 I think, covers it, sir.

14 JUROR: You mean in the further charges, the other
15 counts?

16 THE COURT: No, sir. In my charges to you on the
17 law that is applicable to that.

18 JUROR: Well --

19 THE COURT: If I -- if I understand you, sir.
20 Maybe I don't understand you.

21 JUROR: Well, the question was were we to determine
22 whether this man actually pulled the trigger or not. We
23 never had any, I don't believe, evidence one way or the
24 other which -- who actually pulled the trigger. Was he
25 supposed to be the accomplice in the fact or are we to

1 determine whether he is guilty as being a part of the --

2 THE COURT: Mr. Lawyer, the -- the charge is laid
3 by the indictment, and it means exactly that. Now,
4 included in that charge of murder in the first degree,
5 as laid by the indictment, includes what we call the
6 lesser included charges, which is murder in the second
7 degree, third degree, manslaughter, and attempted
8 murder in the first degree, second degree, and third
9 degree.

10 Now, I don't know of anything to do but take my
11 charges and recharge you on the law that is applicable
12 to that charge. Now, as I stated to you, the State has
13 the burden to prove the charges beyond and to the
14 exclusion of all reasonable doubt.

15 Now, I don't know whether, if you read my charges
16 that I sent in the jury room with you, you will clear it
17 up.

18 JUROR: Well --

19 MR. McGEE: Your Honor, may we approach the bench.

20 (WHEREUPON, A CONFERENCE WAS HELD AT THE BENCH
21 BETWEEN COUNSEL AND THE COURT.)

22 THE COURT: Ladies and gentlemen of the jury, let
23 me ask you to do this: You go back in and you read the
24 jury charges. As I told you at the -- before I ever
25 charged you, they -- they are lengthy, and I appreciate